A

RHB BANK BHD v. MULTI RESOURCES TRADING SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
YEW JEN KIE J
[COMPANIES (WINDING-UP) NO: KCH-28NCC-21-4-2015]
27 JANUARY 2016

B

COMPANY LAW: *Petition – Winding up – Opposition to winding up petition – Proper procedure – Whether by filing summons in chambers supported by affidavit in support to strike out petition – Whether abuse of court process – Whether hearing of petition ought to be deferred pending outcome of summons in chambers – Companies Act 1965, s. 218 – Companies (Winding-Up) Rules 1972, rr. 28(1) & 30(1) – Rules of Court 2012, O. 18 r. 19(1) & O. 42 r. 2*

C

The respondent was served with a winding up petition and the hearing for the same had been fixed. Despite having more than a month to oppose the petition, the respondent did not file any notice of intention to appear nor file any affidavit in opposition as required under rr. 28(1) and 30(1) of the Companies (Winding-up) Rules 1972 ('the Rules'), respectively, to oppose the petition. Instead, the respondent filed summons in chambers ('the SIC') supported by an affidavit in support and served the same to the petitioner two days before the hearing of the petition. The SIC was filed pursuant to O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ('the ROC') and/or inherent jurisdiction to strike out the petition. It was the respondent's contention that since the SIC to set aside the petition had been filed, it ought to be heard and determined first before the petition. The respondent further submitted that by proceeding to hear the petition without hearing the SIC, the court would be effectively pre-judging the application and shutting the respondent out from exercising its basic and fundamental right to be heard on why the petition ought to be struck out. The petitioner argued that O. 18 r. 19 of the ROC has no application to a winding up petition presented under s. 218 of the Companies Act 1965 ('the CA') because such petition is governed by the provisions of the winding up under the CA. The issues that arose for the court's adjudication were (i) whether the hearing of petition ought to be deferred pending the outcome of the SIC; and (ii) whether the respondent could file the SIC under O. 18 r. 19(1)(a), (b), (c) or (d) of the ROC and/or the inherent jurisdiction to strike out the petition instead of filing an affidavit in opposition to oppose the petition.

D

E

F

G

H

Held (striking out respondent's application):

(1) By the clear words in r. 30 of the Rules, it is a mandatory requirement for the respondent, who is opposing the petition, to file and serve an affidavit in opposition at least seven days before the appointed date of hearing the petition. Rule 30 is a mandatory statutory provision that must be strictly complied with. Furthermore, the provision under r. 30(1) of the Rules has clearly provided for a venue for the respondent

I

to oppose the petition by way of affidavit in opposition. In other words, r. 30(1) of the Rules has provided a venue where the respondent could exercise his fundamental right to be heard and ventilate his objection to the petition, if any. (paras 5, 6 & 9)

(2) Pursuant to O. 1 r. 2(2) of the ROC, the provision of O. 18 r. 19 of the ROC has no application to a winding up petition presented under s. 218 of the CA as such petition is governed by the provision of the winding up which are specific rules made pursuant to the CA to regulate the winding up of companies. In furtherance to that, O. 42 r. 2 of the ROC provides that in the event of any inconsistency, the rules under the written laws in Appendix C shall prevail over the ROC. Appendix C clearly provides that the proceedings relating to winding up of companies is subject to the CA and its subsidiary legislation such as the Rules. (paras 11, 12 & 13)

(3) The filing of this striking out application was clearly a tactical manoeuvre to delay the hearing of the petition. The filing of the striking out application just two days before the hearing date of the petition had stalled the hearing which was not only unfair to the petitioner but also clogged the court docket. This was an abuse of the process of court and should not be allowed. The hearing of the petition should proceed regardless of the respondent's striking out application. (paras 25, 26 & 27)

Case(s) referred to:

Alliance Bank Malaysia Bhd v. Popular Acres Sdn Bhd [2014] 1 LNS 619 HC ***(refd)***
Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***
OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd [2013] 1 LNS 151 HC ***(refd)***
Tan Kim Hor & Ors v. Tan Heng Chew & Ors [2003] 1 CLJ 634 CA ***(refd)***

Legislation referred to:

Companies (Winding-up) Rules 1972, rr. 28(1), 30(1)
Companies Act 1965, s. 218
Rules of Court 2012, O. 1 r. 2(2), O. 18 r. 19(1)(a), (b), (c), (d), O. 94 r. 2

For the petitioner - Tan Kee Heng & Ling Pei Ying; M/s SK Ling & Tan Advocs
For the respondent - Andy Tan; M/s Andy & Assocs

Reported by Najib Tamby

JUDGMENT

Yew Jen Kie J:

[1] It is established fact that the petition was duly served on the respondent on 13 May 2015 and the hearing of the petition was fixed on 17 June 2015. The respondent did not file any notice of intention to appear

to oppose the petition under r. 28(1) of the Companies (Winding-up) Rules 1972 nor filed any affidavit in opposition as required by r. 30(1) of the same Rules to oppose the petition. Instead the respondent filed a summons in chambers which is supported by an affidavit in support affirmed on 12 June 2015 and served on the petitioner's advocates on 15 June 2015, that is, two days before the hearing of the petition.

[2] The respondent's summons in chambers was filed under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 and/or inherent jurisdiction to strike out the petition.

[3] Hence, the preliminary issue as to whether the hearing of the winding up petition be deferred pending the outcome of the summons in chambers filed by the respondent.

[4] In my opinion, the preliminary issue should be dismissed for the following reasons.

[5] Rule 30 of the Companies (Winding-up) Rules 1972 expressly provides:

> Rule 30. Affidavits opposing the petition and affidavits in reply.
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.
>
> (2) Any affidavit in reply to an affidavit filed in opposition to a petition (including a further affidavit in support of any of the facts alleged in the petition) shall be filed within three days of the date of service on the petitioner of the affidavit in opposition and a copy of the affidavit in reply shall be forthwith served on the opposing petitioner or his solicitor.

[6] By the clear words in r. 30, it is a mandatory requirement for the respondent who is opposing the petition to file and serve an affidavit in opposition at least seven days before the appointed date of hearing the petition. It is trite law that r. 30, being a mandatory statutory provision, must be strictly complied with.

[7] The question to be asked is: whether the respondent is allowed to file a summons in chambers under O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 and/or inherent jurisdiction to strike out the petition instead of filing affidavit in opposition to oppose the petition, as the respondent herein has done?

[8] Counsel for the respondent submitted that since the respondent had filed a summons in chambers to set aside the winding up petition, this summons in chambers ought to be heard and determined first before the petition is heard. This is because if the court proceeds to hear the petition without hearing the respondent's summons in chambers, the court would be

effectively pre-judging the application and shutting the respondent out from exercising its basic and fundamental right to be heard on why the petition ought to be struck out. To deny the respondent this fundamental right to be heard would constitute a grave miscarriage of justice.

[9] With respect, I do not agree. This is because the provision under r. 30(1) of the Companies (Winding-up) Rules 1972 has clearly provided for a venue whereby the respondent can oppose the petition by way of affidavit in opposition. In the event the court finds that there are good grounds to set aside the petition, an order will be made accordingly. In other words, r. 30(1) of the Companies (Winding-up) Rules 1972 has provided a venue whereby the respondent can exercise his fundamental right to be heard and ventilate his objection to the petition, if any.

[10] Order 1 r. 2(2) of the Rules of Court 2012 states:

> (2) These Rules do not have effect in relation to proceedings in respect of which rules have been or may be made under any written law for the speck purpose of such proceedings or in relation to any criminal proceedings.

[11] In my opinion, as rightly submitted by counsel for the petitioner, pursuant to O. 1 r. 2(2) of the Rules of Court 2012, the provision of O. 18 r. 19 of the Rules of Court 2012 have no application to a winding up petition presented under s. 218 of the Companies Act because such a petition is governed by the provision of the winding up which are specific rules made pursuant to the Companies Act to regulate the winding up of companies.

[12] It is also pertinent to note O. 94 r. 2 of the Rules of Court 2012 which came into force only on 1 August 2012 (with no similar provision under the former Rules of the High Court 1980), provides that in the event of any inconsistency, the rules under the written laws in Appendix C shall prevail over the Rules of Court 2012. Appendix C thereof clearly provides that the proceedings relating to the winding up of companies is subject to the Companies Act and its subsidiary legislation such as Companies (Winding-up) Rules 1972.

[13] It is thus clear from O. 94 r. 2 of the Rules of Court 2012 that the specific law and rules such as Companies Act and Companies (Winding-up) Rules 1972 made thereunder, shall prevail over the Rules of Court 2012 in winding up to proceedings.

[14] The proper procedure in defending a petition to wind up a company is to file an affidavit in opposition at least seven days before the date fixed for the hearing of the petition and not filing a summons in chambers to strike out the petition.

[15] I find support in the following case.

[16] In *Alliance Bank Malaysia Bhd v. Popular Acres Sdn Bhd* [2014] 1 LNS 619, Vernon Ong J (now JCA), in dismissing the respondent's application pursuant to O. 18 r. 19 of the Rules of Court 2012 to strike out the winding up petition and order the winding up of the respondent company held:

> 2. The respondent's application to strike out the winding up petition was made pursuant to O. 18 r. 18 ROC 2012. It is expressly stipulated in the ROC 2012 that the ROC 2012 shall not apply in relation to proceedings where there are rules specifically drawn up for such proceedings (see O. 1 r. 2 ROC 2012). Winding-up proceedings are governed by the Companies (Winding-Up) Rules 1972. Further, s. 221(2)(f) of the Companies Act 1965 provides the Court with the power to invoke its inherent jurisdiction 'to strike out a s. 218 petition. As there is an existing provision for the striking out of a s. 218 petition, O. 18 r. 19 ROC 2012 cannot be resorted to in this case (s. 372(d) Companies Act 1965; *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd* [1996] 4 CLJ 828; *Chong Yee Yan v. Golden Dragon Sdn Bhd* [1999] 3 CLJ 151; [1999] 1 MLJ 573; *Tan Kim Hor v. Tan Heng Chew* [2003] 1 CLJ 634 CA).
>
> 3. For the above reasons, the respondent's striking-out application is misconceived in law and must be dismissed with costs.

[17] The court has on several occasions emphasised against such practice of filing a striking out application in a winding up proceedings which is calculated to delay hearing and disposal of winding up petition. However, the background facts of each case are very much relevant to determine whether a striking out application under O. 18 r. 19 of the Rules of Court 2012 and its predecessor, the Rules of the High Court 1980, is appropriate.

[18] The rationale why striking out application under O. 18 r. 19 of the Rules of the High Court 1980 is undesirable and should be discouraged and even described as "the most abused procedure adopted in a winding up proceedings" is aptly described by Abdul Hamid Mohamad JCA (as he then was) in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 as thus:

> However, I only wish to add a few words to further emphasise my unhappiness (and his too) about the way winding-up petitions are often conducted. Indeed what I am saying here is no more than what I have earlier said on at least four occasions when I was sitting in the High Court. Reference can be made to *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd* [1999] 4 CLJ 135, *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2000] 1 LNS 196; [2000] 6 MLJ 385, *Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd* [2000] 4 CLJ 72 and recently *SP Setia Bhd v. Gasing Heights Sdn Bhd* [2001] 6 CLJ 55.
>
> As pointed out by my learned brother Gopal Sri Ram JCA, the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications. That would invariably stall the hearing of the petition proper. If the application is dismissed, the respondent

would appeal to the Court of Appeal or may even try to go further, further delaying the hearing of the petition. I have come across cases where even an order made by the senior assistant registrar under r. 32 of the Companies (Winding-up) Rules 1972 was appealed against and when the appeal was dismissed, the respondent further appealed to the Supreme Court - see *Asia Commercial Finance (M) Berhad v. Lum Choon Realty Sdn Bhd* (Penang High Court Companies Winding-up No: 28-60-92). Of course, having filed the notice of appeal, the respondent then filed a notice of motion to stay all proceedings pending the disposal of the appeal by the then Supreme Court. When the notice of motion was dismissed, another appeal was filed. The effect is that the hearing and disposal of the petition is delayed.

One of the most abused procedure adopted in winding up proceedings is the application to strike out the petition under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the court.

In *Buildcon-Cimaco Concrete Sdn Bhd v. Filotek Sdn Bhd* [1999] 4 CLJ 135 I pointed out the undesirability of applying such procedure to a winding up petition:

> Besides, the Companies (Winding-up) Rules 1972 provides its own scheme of procedure for a s. 218 winding-up petition which is more simplified and geared for speedy disposal. RHC 1980, for example, provides for appearance (conditional and unconditional), discoveries, interrogatories, judgment in default of pleading, summary judgment (O. 14), striking out of pleadings (O. 18 r. 19), summons for directions and setting down for trial. Hearing date is only given after the directions made in the summons for directions are complied with and the case has been set down for trial. Perhaps because of these requirements which take some time to be complied since the filing of a writ, that procedures for judgment in default of pleading, summary judgment and the striking out of the writs and pleadings are provided, for quick disposal in clear-cut cases.
>
> The scheme under the Companies (Winding-up) Rules 1972 is different. When the petition is issued out of court, a hearing date is given straight away. Whatever has to be done, eg, service, advertisement, compliance with r. 32, will have to be done before the hearing date. The court is supposed to hear the petition straight away on the date fixed for hearing, the very first time it comes up before it. If everything is done as scheduled, the petition is heard on the date first fixed for hearing.
>
> That is what the rules envisage. In the circumstances, there is no necessity for provisions for judgment in default, summary judgment or striking out the pleading or trial on issues. I am of the view that that is the reason why the Companies (Winding-up) Rules 1972 do not provide for such procedures. They are not necessary.

A

> Furthermore, more often than not, resort to O. 18 r. 19 of RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time.

B

> In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

C

These views were reiterated in *Antara Elektrik Sdn Bhd v. Bell & Order Bhd* [2000] 1 LNS 196; [2000] 6 MLJ 385 this time in Malay.

In *Sun Microsystems Malaysia Sdn Bhd v. KS Eminent Systems Sdn Bhd* [2000] 4 CLJ 72, I stressed the difference between the procedure in respect of a writ action under the RHC 1980 and a winding-up petition under the Companies (Winding-up) Rules 1972:

D

> It is important to note that the procedure in a winding-up proceeding as provided by the Companies (Winding-Up) Rules 1972 is different from the procedure in a writ action as provided by the Rules of the High Court 1980 (RHC 1980). In a winding up proceeding, the procedure is simple and brief That is what it is meant to be. When a petition is filed, the senior assistant registrar gives a hearing date straightaway before the petition is issued. The petitioner is expected to do everything he or it has to do in terms of complying with the procedural requirements eg, serving, gazetting and advertising, before the hearing date. The petition is to be heard on the date fixed for hearing.

E

F

> On the other hand, in a writ action upon filing no date (be it for hearing or for mention) is given by the senior assistant registrar. He merely signs the writ and issues it. The writ itself clearly says:
>
> > We command you that within eight days after the service of this writ on you, inclusive of the day of such service, **you do cause an appearance to be entered for you** at the suit of... And take notice, that in default of you so doing the plaintiff may proceed therein to judgment and execution. (emphasis added)
>
> The trial date is a long way off. Indeed, there may not be none at all.

G

H

> It is important that the procedure applicable in a writ action should not be incorporated into a winding-up proceeding. It is not meant to be. Appearance is required (and provided for) in a writ action so that the plaintiff will know whether to take a judgment in default or not. If an appearance is filed, followed by defence, then at the close of the pleadings, the plaintiff should apply for directions and ask for the case to be set down for trial. In other

I

> words, he asks for a trial date. That is not necessary in a winding-up petition because the hearing date has been given even before the petition is issued. That is why there is no provision for appearance, defence, summons for directions, setting down for trial etc. in a winding up proceeding.

Finally, the same view was reiterated in *SP Setia Berhad* (Kuala Lumpur High Court Winding-up Petition No: D8-28-173-2000).

Having written on it four times and in two languages, it is timely that my learned brother Gopal Sri Ram JCA and this court come out strongly against such practice, which, at the very least is delaying the hearing and disposal of winding-up petitions, which is unfair to the petitioners and clogging the court docket.

[19] The Court of Appeal's decision of *Maril Rionebel* was applied and followed in another Court of Appeal's case of *Tan Kim Hor & Ors v. Tan Heng Chew & Ors* [2003] 1 CLJ 634, where Richard Malanjum JCA (as His Lordship then was) said:

> Now, there are strong views expressed by our courts of the undesirability to adopt a striking out procedure in a winding up petition under s. 218 of the Act since it could cause further delay rather than expedite the disposal of such matter.
>
> ...
>
> ...
>
> We find the philosophy implicit in the above statements convincing and adopt it in affirming the view that an application made pursuant to O. 18 r. 19 of the RHC to strike out a petition presented under s. 218 of the Act is undesirable and should be discouraged. In our view, the use of that procedure in such winding up proceeding produces only delay in the adjudication of the matter.

[20] In *OSK Trustees Bhd v. Metroplex Holdings Sdn Bhd* [2013] 1 LNS 151, the High Court held:

> [13] In so deciding, I have taken into considerations the decision of the Federal Court in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481 which has expressed strong views of the undesirability to adopt a striking out procedure in a winding up petition under s. 218 of the Act since it could cause further delay rather than expedite the disposal of such matter. At page 403/paragraph (18) onwards of the judgment, Tun Zaki CJ said:
>
> > [18] As regards applying to strike out a petition to wind up a company, I would like to reaffirm the sentiments expressed by Abdul Hamid Mohamed J (as he then was) regarding invoking O. 18 r. 19 to strike out a petition to wind up a company. In *Filotek Trading Sdn Bhd v. Buildcon-Cimaco Concrete Sdn Bhd* [1999] 1 LNS 140, when discussing the subject said:

A ...

...

> Furthermore, more often than not, resort to O. 18 r. 19 of the RHC 1980 in a winding-up proceedings results in the delay in the hearing of the petition. The application is usually filed one or two weeks before the date
B fixed for the hearing of the petition. Application is made for it to be heard first, supposedly, to save the court's time. In reality, it delays the hearing of the petition. Whenever there is such an application, inevitably, the hearing of the petition is delayed. Not only will the petition be adjourned for the application to be heard first, but if dismissed, there will be an appeal to the higher court(s).

C

[21] I have of late observed a trend of applications under O. 18 r. 19 of the Rules of Court 2012 being filed in winding up court to strike out winding up petition obviously with the view of delaying the hearing of petition. This is because such application will invariably be heard first and upon dismissal,
D notice of appeal would be filed to the higher court.

[22] It is pertinent to note that although Zaki Tun Azmi CJ (as he then was) had said in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481 that O. 18 r. 19 applies to striking out a winding up petition is well-established, His Lordship has expressed strong views in discouraging
E parties in delaying making any interlocutory application and application for striking out should not be considered except in obviously unsustainable proceedings, it was held:

> [15] The courts do not encourage parties to delay making any interlocutory application because by delaying such applications the final
F decision of the court will also be delayed. It had been the practice of some plaintiffs or defendants to wait until the last minute to file all sorts of interlocutory applications. Today the Malaysian courts are discouraging these practices. Parties, particularly now, should not delay proceedings by filing interlocutory applications when the substantive hearing can be fixed by the trial courts early. There is therefore no need to apply for striking
G off petitions to wind up a company (or for that matter, any pleadings) when the same issues could be raised in the hearing of the petition (or the action) and the matter to be finally determined. These expedition disposals have been proven by the practice of our New Commercial Courts and the New Civil Courts, where there are close monitoring of actions filed in that court and cases targeted to be completed within a year from
H filing.
>
> [16] The Court of Appeal and this court (including any appellate court) abhor appeals in respect of interlocutory applications when issues raised in such application could be finally heard and disposed in the main suit. To me, seeking for certain interlocutory orders are sometimes merely
I delaying tactics taken up by a party who do not have a strong case. In some cases, delaying tactics can be taken up by a party to tire out his opponent with a view to forcing that opponent to an unfair settlement.

Delay can cause injustice to a party particularly when he has a strong case. A company which is made a subject of winding up petition can suffer huge losses pending hearing of the petition, more so when a provisional liquidator has been appointed. As we know the service charges of a provisional liquidator can be very high. They will eat into assets of the company to the detriment of the *bona fide* creditors or the shareholders of the company.

[17] Since delay in determining any application to strike out is detrimental to the parties, such application should be heard and decided upon early. Such application should not be considered except in obviously unsustainable proceedings. Where there is any doubt that discretion to strike out should be exercised, such application should be dismissed. Once dismissed, the subject matter of the action should proceed to hearing as soon as possible. The appellate court should be discouraged from spending too much time on an appeal against an order of refusal to strike out since, as I had said, the trial court will be deciding on issues raised by the applicant anyway. If the appellate court is of the opinion that such appeal is obviously to delay the hearing of the action at the trial court, it must be ready to discourage such action by imposing deterrent costs because it is an injustice to the innocent party. However, where it is an appeal against an order striking out any proceedings, the appellate court must be more considerate, since such an order is final. This argument equally applies in cases of applications for summary judgments. If such application for a summary judgment is refused, the appellate court should not waste too much time but to send the case for early disposal.

[23] The undisputed facts in this case showed that the petition dated 14 April 2015 was fixed for hearing on 17 June 2015. It was served on the respondent on 13 May 2015 thereby giving more than one month before the hearing of the petition for the respondent to file affidavit in opposition to oppose the petition.

[24] However, the respondent did not file any notice of intention to appear to oppose the petition under r. 28(1) of Companies (Winding-up) Rules 1972. Neither did it file any affidavit in opposition and serve it on the respondent at least seven days before the hearing on 17 June 2015. On 15 June 2016, just two days before the hearing of the petition, the respondent filed and served on the petitioner's advocates the striking out summons in chambers under O. 18 r. 19 of the Rules of Court 2012.

[25] In my opinion, the filing of this striking out application is clearly a tactical manoeuvre to delay the hearing of the petition. If this striking out application had not been filed on 15 June 2015, the petition would have been heard on 17 June 2015 and the winding up court would have allowed the petition in the absence of opposition from the respondent. In my view, this tactical manoeuvre to delay the hearing of the petition and the fair disposal of the same is an abuse of the process of the court and it should not be allowed to delay the hearing of the winding up.

[26] In the striking out application the respondent applied to set aside the petition on five grounds which are purely relating to compliance of various rules under the Companies (Winding-up) Rules 1972. If the respondent was serious in defending the petition, there is no reason why it could not raise these grounds in an affidavit in opposition in defending the petition proper, have it heard and decided in the hearing of the petition. The filing of the striking up application just two days before the hearing date of the petition has stalled the hearing which is not only unfair to the petitioner but also clogged the court docket. It is clearly an abuse of the process of the court and should be discouraged.

[27] For all the above reasons, it is my view that the hearing of the petition should proceed forthwith regardless of the striking out application.